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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 177

FRANK J. FABIAN, JOSEPH E. FABIAN AND ROBERT P. SZALAY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW.

The opinion of the court of appeals (Pet. App. A) is reported at 358 F. 2d 187.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 1966. On April 22, 1966, Mr. Justice White extended the time to file a petition for a writ of certiorari to May 27, 1966, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners had a constitutional right to be informed of the grand jury's proceedings and to appear, with counsel, before that body.

2. Whether the jury panel was prejudiced by a remark made during *voir dire* by one prospective juror.

3. Whether misrepresentations made by petitioner's salesmen to customers out of the presence of petitioners were admissible in evidence.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Iowa, petitioners were convicted of sixteen counts of mail fraud, in violation of 18 U.S.C. 1341. Frank and Joseph Fabian were sentenced to concurrent terms of imprisonment for three years, with a recommendation that they be eligible for parole after six months, and to a consecutive term of three year's probation. Szalay was adjudged a youthful offender and was given a suspended sentence. He was placed on probation for three years. The court of appeals affirmed.

The scheme for which petitioners were convicted involved the sale of stereo sets by fraudulent misrepresentations. The sufficiency of the evidence is not in dispute and it is detailed in the opinion of the court of appeals. The following is a summary of one representative transaction which shows the outline of the scheme:

On December 19, 1962, less than three months after petitioners had commenced operations, one of their salesmen, Don Knight, demonstrated a stereo set at the home of Mr. and Mrs. Malsum, in Des Moines,

Iowa (Tr. 152–153).[1] The sales price of the set was said to be $399.75 (Tr. 157).[2] The salesman represented that the Malsums could earn the entire price by making use of the provisions of the "Owner's Dividend Certificate," whereby petitioners' corporation would pay $15 for each referral of a qualified potential customer (Tr. 156). The salesman stated that there was no limit to the number of referrals which could be made, and the customer had two years to make referrals. The referral system was represented as a substitution for costly advertising in national media (Tr. 154). The Malsums were led to believe that similar operations in Lincoln and Omaha, Nebraska, had been highly successful.[3] They decided to purchase the stereo, and asked whether they could pay cash for the set (Tr. 158). Knight replied that the dividend program was the only method of purchase. The customers thereupon made a $9.95 down payment. Several days later they received a payment book from a finance company, which added $89 to the original price (Tr. 159, 167).[4] They referred approximately

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[1] A nine-volume record has been filed with the Clerk of this Court. Volumes 2–4 contain the transcript of trial, which is referred to as "Tr.".

[2] The cost to petitioners was in the range of $98 to $103 plus freight (Tr. 44).

[3] In fact, the operations in Lincoln and Omaha were total failures (Tr. 134–135, 320–321). Frank and Joseph Fabian had been part time salesmen for the Omaha company; Knight was a salesman in Omaha, and a part owner of the Lincoln operation (Tr. 131, 132).

[4] As part of the sales demonstration many customers were told that they could earn the entire price of the set by making only 26 referrals (Tr. 237, 476, 485, 503, 537, 570–571, 596, 610, 778, 846). Often the customers were not told that their pay-

30 names to petitioners' company. At least 17 of these were approached by petitioners' salesmen. Six sales were made, but the Malsums received only $30 (Tr. 159, 170). Three months after this sale, petitioners closed their office in Des Moines and left the State (Tr. 767, 809).

ARGUMENT

1. In this Court petitioners assert, for the first time, that their indictment was defective because they had no notice of the pendency of the grand jury proceeding and were afforded no opportunity to appear personally and testify (Pet. 11–16). The argument totally misconceives the nature of the grand jury's function. Proceedings before the grand jury are, by their very nature, secret (*Levine* v. *United States*, 362 U.S. 610, 617), and the grand jury's task is to "initiate prosecution" (*Cobbledick* v. *United States*, 309 U.S. 323, 327). In no sense is the grand jury proceeding part of the adversary process. The time-honored role of the grand jury was described in IV Blackstone, *Commentaries* (Cooley 2d ed. 1872) 303:

> * * * they are only to hear evidence on behalf of the prosecution: for the finding of an indictment is only in the nature of an inquiry or accusation, which is afterwards to be tried and determined; and the grand jury are only to inquire, upon their oaths, whether there be sufficient cause to call upon the party to answer it. * * *

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ments would be made to a finance company and would include the cost of "carrying charges" (Tr. 398, 403, 461, 507, 530, 539, 546, 572, 611).

See also *Respublica* v. *Shaffer*, 1 Dallas 236; *United States* v. *Bolles*, 209 Fed. 682 (W.D. Mo.).

It is clear, therefore, that petitioners had no right to appear before the grand jury which returned their indictment. See *United States ex rel. McCann* v. *Thompson*, 144 F. 2d 604 (C.A. 2), reversed on other grounds, 317 U.S. 269; *Duke* v. *United States*, 90 F. 2d 840 (C.A. 4), certiorari denied, 302 U.S. 649; *United States* v. *Scully*, 225 F. 2d 113 (C.A. 2), certiorari denied, 350 U.S. 897. The failure to notify them that the grand jury was considering allegations made against them did not, therefore, deprive them of any procedural right to which they were entitled.

2. During the selection of the jury petitioners alleged that they overheard one prospective juror state that he had been a juror in another mail fraud case "many years ago" during a World Series, and that he had then remarked to the other jurors during their deliberations, "let's find him guilty and go watch the World Series" (Pet. 16). The remark was made in a corridor, and petitioners could not say how many panel members heard the statement (Affidavit of Defense Counsel, Vol. 1 of court record). The trial judge conferred with government and defense counsel in chambers, and ruled that petitioners would be allowed an additional peremptory challenge. When the juror who had made the remark was called, the trial judge excused him for cause. Defense counsel made

no objection to the court's procedure, nor did he challenge the panel.[5]

Petitioners' claim that the trial judge abused his discretion in failing to dismiss the entire panel comes too late in view of their failure seasonably to object to the course followed by the trial judge. *Batsell* v. *United States*, 217 F. 2d 257 (C.A. 8); *Johnson* v. *Hill*, 274 F. 2d 110 (C.A. 8); *Shotwell Mfg. Co.* v. *United States*, 371 U.S. 341. In any event, petitioners had the "burden of showing essential unfairness", and had to sustain that burden by setting forth "demonstrable reality", not mere speculation, that the panel was prejudiced by the isolated comment made by the prospective juror. *Beck* v. *Washington*, 369 U.S. 541, 558. The remark was plainly innocuous; it did not remotely reflect upon the guilt of innocence of the defendants about to stand trial and was, therefore, distinguishable from the information which improperly reached the jurors in *Marshall* v. *United States*, 360 U.S. 310.

3. At trial, defense counsel objected to the admission of statements made by petitioners' salesmen to purchasers. After a discussion with counsel, the trial judge overruled the objection and instructed the jury (Tr. 184–186):

> Before you may consider such evidence as to any defendant, you must first find that the gov-

[5] The affidavit of the government counsel, filed in Volume 1, alleges that the trial judge specifically asked defense counsel if he desired a mistrial, and that counsel affirmatively consented to the procedure adopted by the court. Defense counsel's affidavit denies that he agreed to the procedure, but concedes that he did not "make a record" because of a failure to "challenge the array."

ernment has, by evidence apart from such statements, established beyond a reasonable doubt, one, that the particular defendant and the person or persons making the statement or statements had knowingly and intentionally participated in devising the scheme described in the indictment. Two, that the statement or statements were made pursuant to such scheme and in furtherance thereof.

If the government has as to a particular defendant so established one and two, you may consider such evidence in passing upon the guilt of such defendant and give it such weight as you feel it's entitled to. If the government has not so established both one and two, then you should reject such evidence and give it no consideration in passing on the guilt of such defendant.

* * * * *

Now, in a lawsuit such as this you have to start somewhere, and of course the whole case is not before you at this time. So the Court admits the testimony subject to being connected up. If the Court finds as a matter of law later on that the testimony is not connected up, I will make appropriate rulings or give appropriate instructions, but I give you this instruction now, and it is a caution to you that normally statements made in behalf—statements made to the purchasers here—there will be, as I understand it, various salesmen and purchasers who will be testifying about statements made to them. The Court gives you that caution, that such statements are not binding on these defendants unless it is shown by all the evidence and you find by all of the evidence that there was a scheme to defraud by

> these three defendants and these statements were made pursuant to that scheme, then you may consider that evidence in passing on their guilt or innocence.

At the conclusion of this instruction, defense counsel noted his satisfaction (Tr. 186).

The procedure followed by the trial judge was proper. The scheme to defraud was clearly shown to have included sales made by means of certain false representations conveyed through salesmen, many of whom received their training from petitioners (cf. Pet. App. A, 30, note 3). See *Reistroffer* v. *United States*, 258 F. 2d 379, 387 (C.A. 8), certiorari denied, 358 U.S. 927; *Schaefer* v. *United States*, 265 F. 2d 750 (C.A. 8), certiorari denied, 361 U.S. 844; *Ader* v. *United States*, 284 Fed. 13 (C.A. 7), certiorari denied, 260 U.S. 746; *Whitehead* v. *United States*, 245 Fed. 385 (C.A. 5), certiorari denied, 245 U.S. 670.

There is no merit to petitioner's allegation that the entire scheme had to be proved prior to the admission of the salesmen's statements. The order of proof is within the sound discretion of the court, and there was no abuse in this case. *Rizzo* v. *United States*, 304 F. 2d 810 (C.A. 8), certiorari denied *sub nom. Nafie* v. *United States*, 371 U.S. 890. The totality of evidence adduced by the prosecution clearly proved the scheme to defraud.[4]

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[4] Petitioners' reliance upon *Beck* v. *United States*, 305 F. 2d 593 (C.A. 10), certiorari denied, 371 U.S. 890, 895, is misplaced. The Tenth Circuit in *Beck* cited *Reistroffer*, *Schaefer*, and other similar cases approvingly, while observing that "[a] proper foundation must always be laid." 305 F. 2d at 600. As noted by the court of appeals in this case (Pet. App. 31), the concluding generalization of the Tenth Circuit cannot fairly be read as prescribing the order of proof. Indeed, the Tenth

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1966.

Circuit's reliance on *Reistroffer*, as well as that court's earlier decision in *Bartlett* v. *United States*, 166 F. 2d 920 (C.A. 10), where statements in a conspiracy case were admitted subject to subsequent connection, indicate that the Tenth Circuit's rule on the order of proof in conspiracy cases does not differ from the rule in other circuits.

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